

Employee Relations, Title VII, and the Confederate Battle Flag

By Gillian Watson Egan

Many workplaces situated below the Mason-Dixon line will employ both those who feel the Confederate flag is a vital part of their heritage and self-expression, and also those who see the Confederate flag as a symbol of racism, fear and intimidation. The issue and controversy surrounding Confederate flag-flying is by no means a new one. However, after the brutal and horrific slaying of nine African Americans at a prayer meeting in Charleston, and subsequent removal of the flag from official government buildings in several southern states, the Stars and Bars has recently become a flash point for southern tempers. What's a manager to do when one employee claims another's display of the flag makes her fearful? What if the flag-waver claims that it has no racial significance for him, but only historical pride? What if she retorts that the flag is creating a "hostile work environment" and threatens a harassment claim under Title VII of the Civil Rights Act of 1964? What if he answers that his right to fly the flag is actually *protected* by Title VII, under a "national origin" or "religious" category?

Many of these questions have been asked and answered in the courts. First, for the flag-waver: The federal courts have not embraced claims that Title VII protects the right to display the Confederate flag at work (either as a religious symbol or show of pride in national origin). For example, in *Storey v. Burns Intern. Security Services*, 390 F.3d 760, 761 (3rd Cir. 2004), a Pennsylvania security guard brought claims for discrimination based on his national origin (as a "Confederate Southern-American") and religion (Christian). He was asked to remove Confederate bumper stickers from his lunchbox and truck, and was terminated when he refused. The Third Circuit held that his termination was not *because of* his national origin or religion, but because of his failure to cover up the Confederate stickers despite the employer's request. Furthermore, his desire to display the stickers was not a sincerely held belief that was fundamental to his religious identity, and so the employer had no duty to accommodate his requests to keep them. The Court distinguished his case from a case involving a request for a Sabbath day off, and another involving a facial hair ban that violated a Muslim's religious requirement to grow a beard. These latter religious practices were endemic to a religiously mandated observance, as opposed to the plaintiff's personal (but not religiously mandated) need to share his heritage. An employee's display of the Confederate flag is not protected activity under federal discrimination laws.

On the other hand, courts have ruled that the display of Stars and Bars in the workplace by employees (e.g. on personal items) generally will not, by itself, rise to the level of conduct so severe and pervasive as to establish a hostile work environment for those co-workers who object. Thus, the sight of a

Confederate flag generally will not constitute *harassment* of those who object to it (though see the next paragraph concerning claims for *discrimination*, where the Confederate flag presents more of a liability). For example, in *McDonald v. ST Aerospace Mobile, Inc.*, 2013 WL 1007712, at *8 (S.D.Al. 2013), an African American employee brought claims of harassment and retaliation against his employer after he received a suspension for a violation of company procedures. This suspension occurred three years after he had filed a complaint about racist graffiti and Confederate flags displayed in the employer's facility. He alleged the suspension was actually motivated by discrimination, and in retaliation for that complaint, and further alleged that those flags created a hostile work environment. The court granted summary judgment to the employer, noting that displays of Confederate flags and some racist graffiti did not alter the African American plaintiff's working conditions so as to create an abusive working environment. (It helped that the employer immediately ordered removal of the graffiti and flags, once it was made aware of them.) Another Alabama federal district court came to a similar conclusion in *Carter v. Daehan Solutions Ala., LLC.*, 2010 WL 431221 (MD Ala. 2010), holding that Confederate flag stickers and t-shirts alone did not a hostile work environment make.

These cases should not be read to give employees carte blanche to bring Confederate memorabilia to work, however. Although the presence of such items may not create liability for a hostile work environment claim, it could be used as evidence of racial bias to support general claims of discrimination. In one recent case, an Alabama policeman, the only black sworn police supervisor on the force in the City of Dothan, was terminated after the department conducted an investigation into his involvement in a motorcycle club. He later filed claims of race discrimination, arguing that this investigation was a sham, and part of a broader history of unlawful racially hostile attitudes. His claims survived the City's motion for summary judgment in part because the blatant presence of Confederate memorabilia throughout the department constituted circumstantial evidence of racial bias that supported his claims. (See *Gray v. City of Dothan*, 2015 WL 3849576 (M.D. Ala. 2015).) Generally, then, the courts view Confederate flags as evidence that supports claims of racism, and their presence in the workplace could be used against the company in race discrimination claims (and possibly claims for discrimination based on color and national origin as well).

If a company considers making a policy precluding Confederate memorabilia at work, how far should the ban extend? The parking lot? Two Alabama men recently alleged that their Decatur employer fired them for refusing to remove Confederate flags from their personal vehicles, which were parked at the company lot. Though the flags were not brought inside, the company responded to complaints about the flags by requesting that they be removed while the trucks were parked at work. News reports indicate that the men have not capitulated, and the company has also thus far held its ground, refusing to allow them to return until they agree to take the flags down while parked at work. In South Carolina, shortly after the prayer meeting shooting of nine African American victims, a North Charleston policeman was fired for posting a photograph on his personal Facebook page. The photo was of him posed wearing nothing but a pair of Confederate flag boxer shorts. The Police Chief stated in a letter that, given the racial tensions immediately after the Charleston church shooting, the picture was "inflammatory" and "unacceptable," and undermined the department's relationship with Charleston

citizens. The letter went on to note that if the offending policeman was permitted to remain on the force and make arrests, the photo could become a tool for any criminal arrestee's defense counsel to argue a racial bias. The photograph does not appear to have been taken at work or during working hours, and in fact has no link to the workplace, yet nevertheless the policeman was fired because of its impact on his credibility at work.

These are difficult issues. Although public entities will have some First Amendment considerations to keep in mind, private entities for the most part are free to choose how to handle Confederate flag memorabilia, and objections thereto. Employers must understand the significance and potential liability of allowing such memorabilia in the workplace, while also navigating the tricky issues when evidence of problematic out-of-work behavior arises. (Employers should further note that a handful of states, in the South and elsewhere, have laws that prevent an employer from making an employment decision based on an employee's legal, out-of-work behavior, further complicating the issue.)

Tough as these problems are to discuss, do not let a heated argument over the Stars and Bars catch you unaware. If the issue has not arisen in your workplace, it may yet. Decide now how it should be handled, and make sure your supervisory staff know what to do *before* they get that anonymous tip about a Facebook photo, or are faced with a pair of employees arguing loudly over a Confederate flag lunchbox in the break room.

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